LIM SIEW KIM v. KIEN HUAT REALTY SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN J
[SUIT NO: WA-22NCC-332-09-2016]
13 JULY 2022

Abstract – *A plaintiff must cross the threshold of having good grounds for an adjournment. If the plaintiff has good grounds, the discretion should generally be exercised to grant the adjournment unless it causes prejudice to the defendant in a manner that cannot be compensated by costs, regardless of how valid and meritorious the plaintiff's grounds are for seeking the adjournment.*

CIVIL PROCEDURE: *Trial – Adjournment – Application for – Applicant had undergone major surgery and would require post-surgery care and could not give evidence at trial nor give instructions to counsel – Further submission that applicant lacked mental capacity to participate in proceedings, to give instructions to counsel and to litigate – Whether adjournment ought to be allowed – Whether adjournment would prejudice opponent in manner that could not be compensated by costs*

After continued trial had been fixed to take place in early January 2022, the plaintiff applied for an adjournment of the continued trial indefinitely as: (i) she had undergone a major surgery and would require post-surgery care for four to six months and, therefore, could not give evidence at trial until after June 2022; and (ii) counsel would not be able to obtain instructions from the plaintiff. Apart from the surgery, two weeks later, the plaintiff's counsel informed the court that the plaintiff's capacity to participate in and conduct proceedings and capacity to instruct solicitors were impaired and the plaintiff would also lack the mental capacity to litigate. Objecting to the plaintiff's application, the defendants submitted that (i) they had already been prejudiced by the previous circumstances of the case, in particular, the previous adjournments sought by the plaintiff, including, for her elective dental surgery and time required from the same; (ii) a further adjournment would further prejudice the defendants in a manner that could not be compensated by costs; and (iii) there was no guarantee that each of the defendants' witnesses would be able to be present and give evidence on the trial dates fixed or any adjourned trial dates as they were elderly.

Held (refusing application; dismissing case):

(1) There was no guarantee that each of the defendants' witnesses would be able to be present and give evidence on the trial dates fixed or any adjourned trial dates as they were elderly. The youngest witness was 68 while the oldest was 75 and their health condition and longevity were uncertain. Issues such as the quality of evidence was also a relevant consideration. The evidence of the defendants' witnesses also tied to the

A authenticity and admissibility of key documents which were disputed by the plaintiff. If these witnesses were not present to give evidence, then the defendant may also have difficulty or may not be able to admit these documents. (paras 35 & 36)

(2) The numerous grounds to support prejudice raised by the defendants had B clearly been made out by the defendants. The sum total of the grounds raised clearly resulted in an injustice which could not be compensated by costs to the defendants if an adjournment was granted indefinitely. Matters beyond medical evidence must be considered in exercising the court's discretion. The proceedings involved serious allegations against C the defendants which would have serious consequences for them if sustained. The injustice to the defendants outweighed the medical evidence given by the plaintiff. (paras 37-39)

(3) The inability for counsel to seek instructions from the plaintiff was not something new. The court had previously vacated seven and four days, D respectively, following the plaintiff's medical conditions. If the plaintiff saw it fit to file her suit in 2016, she must be prepared to instruct counsel long before the early January 2022 dates. The plaintiff must shoulder the responsibility to ensure that proper and timely instructions were given to her counsel to prepare for trial. This went back to the seriousness of E the plaintiff in wanting to prosecute her case. The plight of the plaintiff could not be the sole consideration for the court when there was prejudice that could not be compensated by costs. (paras 42-45)

(4) There was nothing that was produced by the plaintiff to support her mental condition but for the submission made by her counsel. Labouring F under mental incapacity could not be lightly taken; it is a serious condition. It was entirely inappropriate for any submissions on this to be made on behalf of the plaintiff without appropriate foundation, particularly as it fell within the purview of a medical expert. The plaintiff's solicitors were not qualified to regard the plaintiff as a patient G under the Mental Health Act 2001 or to assert any similar condition. There was absolutely no evidence of the plaintiff's mental disability or lack of mental capacity, whether current or prospective, before the court. (paras 52 & 57)

(5) Where the circumstances are such that some form of delay is H contemplated by reason of a plaintiff's actions, whether by reason of a request for adjournment or want of prosecution, which results in prejudice to the defendants that could not be compensated by costs, the court is entitled to dismiss the case. In exercising the court's inherent powers, the plaintiff's case was dismissed with costs. (paras 77 & 79)

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Case(s) referred to:

Anne Lim Keng See v. Malayan Banking Bhd [2009] 10 CLJ 34 HC ***(refd)***
Dick v. Piller [1943] 1 All ER 627 ***(refd)***
Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***
Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 FC ***(refd)***
Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369 CA ***(refd)***
R v. Kingston Upon Thames Justices Ex p Martin [1994] Imm AR 172 ***(refd)***
Senai Penting Properties Sdn Bhd v. Tri-Master Industries Sdn Bhd & Anor [2006] 7 CLJ 135 HC ***(refd)***
Sheikh Abdul Aziz Sheikh Shukor & Ors v. Sheikh Mustapha Sheikh Shukor & Ors [2004] 3 CLJ 108 CA ***(refd)***
Tee Ha Leong v. Tetuan Low & Lim & Anor [2005] 2 CLJ 78 HC ***(refd)***
The Financial Conduct Authority (A Company Limited by Guarantee) v. Avacade Limited (in liquidation) (trading as Avacade Investment Options), Alexandra Associates (U.K.) Limited (trading as Avacade Future Solutions), Craig Stanley Lummis, Lee Edward Lummis, Raymond George Fox [2020] EWHC 26 ***(refd)***
Toh Hock Thye & Ors v. Toh Chwee Biow [1981] 1 LNS 143 FC ***(refd)***
Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 73A(3)
Rules of Court 2012, O. 35 rr. 3, 4(2), (6)

For the plaintiff - Lim Kian Leong, Fiona Bodipalar, Tobias Lim, Khor Heng How & Tan Hei Zel; M/s Bodipalar Ponnudurai De Silva
For the defendants - V Sithambaram, Christopher Leong, Shamala Devi Balasundaram, Ruebankumar Asokan & Ng Jack Ming; M/s Chooi & Company + Cheang & Ariff

Reported by Najib Tamby

JUDGMENT

Ahmad Fairuz Zainol Abidin J:

Introduction

[1] Continued trial was fixed on 10 January 2022, 11 January 2022, 12 January 2022, 13 January 2022, 27 January 2022, 28 January 2022 ('the early January 2022 dates'), 11 April 2022, 12 April 2022, and 20 June 2022 to 23 June 2022. The plaintiff in the current suit applied for an adjournment of the continued trial indefinitely on the grounds that the plaintiff was labouring under a serious medical condition ('the application'). The defendants strenuously objected to the application, citing that they would suffer prejudice that could not be compensated by costs. Upon considering the submissions by counsel for the plaintiff and defendants, this court refused any further adjournments and dismissed the plaintiff's case.

A **[2]** These grounds of judgment will explain the reasons why this court ruled in such a manner despite medical evidence being produced to support the plaintiff's application. Considerations which went beyond the medical evidence were evaluated. The issue of prejudice which could not be compensated by costs was the ultimate consideration of this court.

B **Background Facts**

[3] By a letter dated 6 January 2022, the plaintiff wrote to the court and to the defendants' solicitors, stating that the plaintiff had undergone major surgery, that she would need after surgery care for four to six months, and that she therefore could not give evidence at trial until after June 2022. A C request was made for a case management date for the plaintiff's solicitors to explain the effect of the plaintiff's stated inability to attend trial for four to six months. This court converted the 10 January 2022 trial date into a case management date for the plaintiff to address the court.

D **[4]** At the case management on 10 January 2022, the plaintiff's solicitors disclosed a redacted doctor's letter dated 28 December 2021 stating:

(i) the plaintiff underwent major surgery on 10 November 2021;

(ii) the plaintiff would be undergoing certain related treatment over a period beginning in January 2022; E

(iii) the plaintiff would have various side effects as a result of her therapy; and

(iv) the plaintiff should restrict exposure to the public at least six months during the therapy "until she fully recovers".

F **[5]** On 10 January 2022, the plaintiff also sought an adjournment of the remainder of the early January 2022 dates and all other hearing dates on the basis of the plaintiff's medical condition as disclosed in the redacted letter. An adjournment was sought until August 2022 with plaintiff's counsel stating that this was on the assumption (based on the medical report) that treatment G will be completed and the plaintiff would have recovered such that she could give instructions for conduct of the trial.

[6] When enquired by the court whether continued trial could proceed with the scheduled formal witnesses, plaintiff's counsel also took the position that the plaintiff could not proceed with producing her four formal witnesses H as originally scheduled for the early January 2022 dates as in the event that instructions were needed, the plaintiff's solicitors would not be able to take instructions from the plaintiff.

[7] As the court understood, it was impossible for the plaintiff to proceed I with the trial until at least August 2022, but even that August 2022 date is uncertain because it depends on the plaintiff's condition at that time. Basically, the plaintiff's application meant that the further trial dates would be at large or uncertain.

[8] It is important to note that the continued trial dates in January 2022 were fixed and agreed upon by all parties on 30 June 2021. Thus, the trial dates were fixed long before the final case management on 7 December 2021 ('the final CM'). Additional dates were also fixed on 30 June 2021 which included 7, 27 and 28 October 2021 with strict instructions to counsel to prioritise the current suit.

[9] It was not surprising that the defendants vigorously opposed the plaintiff's adjournment application, submitting that the defendants have already been prejudiced by the previous circumstances of the case, and in particular by the previous adjournments sought by the plaintiff, including for her elective dental surgery and time required to recover from the same. A further adjournment would further prejudice the defendants in a manner that cannot be compensated by costs.

[10] After hearing oral submissions on the plaintiff's request for adjournment, it was clear that the plaintiff could not progress with the early January 2022 dates. This court then directed parties to address the following in their written submissions before a decision is delivered on the plaintiff's adjournment application:

(i) merits of the grounds in respect of the adjournment sought by the plaintiff; and

(ii) options available to the court in the event the court is not inclined to grant the adjournment.

The Progress Of The Suit

[11] The suit was filed on 23 September 2016. A brief chronology of material events is as follows:

(i) by a notice of application dated 25 October 2016 (encl. 6), the defendants applied to strike out the plaintiff's claim ('striking out application'). This striking out application was dismissed by the High Court on 19 June 2017. The second defendant appealed to the Court of Appeal against the dismissal, and his appeal to the Court of Appeal was dismissed on 21 August 2018. The matter was accordingly sent back to the High Court for trial in August 2018;

(ii) case management directions were first given by the then High Court Judge, Justice Lau Bee Lan on 5 October 2018;

(iii) on 25 February 2019, Justice Darryl Goon Siew Chye renewed the pre-trial case management directions and on 25 June 2019, this court directed that all case management directions given by YA Darryl Goon Siew Chye be complied with;

A (iv) on 30 September 2020, an "unless order" was given for case management directions to be complied with by 3 November 2020 (later extended to 11 November 2020, and then to 16 November 2020, and then to one week after a decision on encl. 123 which was the plaintiff's application for discontinuance of the suit with liberty to
B file afresh filed on 9 October 2020);

(v) on 21 December 2020, under an unless order, a list of witnesses was directed to be filed by 19 January 2021 and witness statements to be filed by 26 January 2021. It was further directed that trial is to proceed from 2 February 2021 to 5 February 2021, 1 March 2021 to
C 4 March 2021 and 5 July 2021 to 8 July 2021;

(vi) at case management on 26 January 2021, trial dates from 2 February 2021 to 5 February 2021 were vacated due to the movement control order ('MCO'). Parties were directed to proceed to trial during the March 2021 dates with the plaintiff's expert to give evidence by
D remote communication technology during those dates;

(vii) on 17 February 2021, the four trial dates in March 2021 were taken off at the plaintiff's request because the plaintiff's counsel informed the court that they were having difficulties finding independent
E supervising solicitors in Hong Kong;

(viii) on 29 June 2021, the trial dates for July 2021 were vacated in view of the full MCO. Trial dates from 21 September 2021 to 23 September 2021, and 11 October 2021 were maintained;

(ix) on 1 July 2021, the court fixed additional trial dates: 7 October 2021,
F 27 October 2021, 28 October 2021, 10 January 2022 to 13 January 2022, 27 January 2022 and 28 January 2022;

(x) on 3 September 2021, the plaintiff sought to begin trial only on 23 September 2021 due to availability of its expert witness on that day
G in Hong Kong. This was allowed. As such, the trial dates on 21 September 2021 and 22 September 2021 were vacated;

(xi) trial proceeded on 23 September 2021 and 7 October 2021. The trial dates fixed for 11 October 2021, 27 October 2021 and 28 October 2021 were vacated as these had been reserved for the plaintiff's expert
H witness; and

(xii) at the final CM, it was directed that the formal witnesses for the plaintiff are to give evidence by remote communication technology from 10 January 2021 to 13 January 2021. The plaintiff is to give evidence in person in court on trial dates beginning 27 January 2022.

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The Adjournments Granted To Date

[12] In the year 2020 alone, the trial was adjourned a total of six times, five of these upon the application of the plaintiff. In total, 31 trial dates were vacated in 2020: 18 February 2020, 19 February 2020, 20 February 2020, 21 February 2020, 24 February 2020, 25 February 2020, 26 February 2020, 27 February 2020, 28 February 2020, 28 April 2020, 29 April 2020, 15 June 2020, 16 June 2020, 17 June 2020, 1 July 2020, 2 July 2020, 3 July 2020, 20 July 2020, 21 July 2020, 22 July 2020, 23 July 2020, 22 September 2020, 23 September 2020, 24 September 2020, 17 November 2020, 18 November 2020, 19 November 2020, 20 November 2020, 14 December 2020, 15 December 2020 and 16 December 2020.

[13] In the year 2021, trial was further adjourned on multiple occasions before commencement. The 17 trial dates vacated were 2 February 2021, 3 February 2021, 4 February 2021, 5 February 2021, 1 March 2021, 2 March 2021, 3 March 2021, 4 March 2021, 5 July 2021, 6 July 2021, 7 July 2021, 8 July 2021, 12 July 2021, 13 July 2021, 14 July 2021, 21 September 2021 and 22 September 2021 before the trial finally commenced on 23 September 2021.

[14] Trial dates in March 2021 were vacated at the plaintiff's request as the plaintiff had not made the necessary arrangements for her expert witness to give evidence remotely from Hong Kong.

[15] The discontinuance application filed by the plaintiff in encl. 132 also resulted in some dates being taken off in anticipation of trial not needing to go on.

Analysis

The Principles Of Law On Granting Adjournments

[16] The Rules of Court 2012 on adjournment is found under O. 35 r. 3. It reads as follows:

> The Judge may, if he thinks it is expedient in the interest of justice, adjourn a trial not more than three times, unless the circumstances otherwise require, and upon such terms, if any, as he thinks fit.

[17] Law reports are replete with cases discussing how discretion is exercised when granting adjournments. Of relevance and one which mirrors the current scenario can be seen in the Federal Court decision of *Lee Ah Tee v. Ong Tiow Pheng & Ors* [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187; [1984] 1 MLJ 107 where various adjournments had already been granted to the plaintiff before the Judicial Commissioner refused to grant a further adjournment and proceeded to dismiss the petition on the merits. On appeal, the Federal Court held (at p. 189 (CLJ); p. 109 (MLJ)):

A It can be seen clearly here that this is **not really a case of refusing an application for adjournment but a case of refusing to further adjourn the hearing after a number of adjournments granted** previously ...

The discretion of the Judge to allow or refuse an application for adjournment was a subject dealt with in depth by the Court of Appeal in *Dick v. Piller*. We agree to and adopt the following principles as regards B the discretion in allowing or refusing an adjournment:

(1) Whether or not a party should be granted an adjournment is wholly at the discretion of the Judge. He would exercise the discretion solely upon his view of the facts.

C **(2) *Prima facie* this discretion is unfettered.**

(3) The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment.
(emphasis added)

D **[18]** In *Dick v. Piller* [1943] 1 All ER 627 as cited by the Federal Court in *Lee Ah Tee*'s case, the English Court of Appeal held as follows:

The case resolves itself into a short question of law. If an important witness – *a fortiori* if he is a party – is prevented by illness from attending the court for an adjourned hearing, at which his evidence is directly and seriously material, *what is the legal duty of the judge when an adjournment is* E *asked for? In my view, if he is satisfied (i) of the medical fact and (ii) that the evidence is relevant and may be important, it is his duty to give an adjournment – it may be on terms – but he ought to give it unless, on the other hand, he is satisfied that an injustice would thereby be done to the other side which cannot be reduced by costs. These questions may depend on matters of degree, and matter of fact may be involved* ... (emphasis added)

F **[19]** The burden is on the person seeking the adjournment to persuade the court to exercise the discretion in his or her favour. (See *Sheikh Abdul Aziz Sheikh Shukor & Ors v. Sheikh Mustapha Sheikh Shukor & Ors* [2004] 3 CLJ 108).

G **[20]** In other words, the plaintiff must cross the threshold of having good grounds for an adjournment. If the plaintiff has good grounds, the discretion should generally be exercised to grant the adjournment unless it will cause prejudice to the defendants in a manner that cannot be compensated by costs. What this means is, an adjournment should not be granted if the defendants H will be prejudiced in a manner that cannot be compensated by costs regardless of how valid and meritorious the plaintiff's grounds are for seeking the adjournment.

[21] In the recent English High Court case of *The Financial Conduct Authority (A Company Limited by Guarantee) v. Avacade Limited (in liquidation)* I *(trading as Avacade Investment Options), Alexandra Associates (U.K.) Limited (trading as Avacade Future Solutions), Craig Stanley Lummis, Lee Edward*

Lummis, Raymond George Fox [2020] EWHC 26 (Ch), the court observed that matters beyond medical evidence should be considered in exercising its discretion whether to allow an application for adjournment:

> 74. I am asked to adjourn the trial. That is essentially a case management decision which I must make taking account of all relevant factors and *bearing in mind in particular the overriding objective and the need to deal with cases justly. As has been said, that involves looking at the position in the round and not from the perspective of one party only. I must therefore obviously take into account matters beyond the medical evidence available to me.* I draw attention in particular to the following.
>
> 75. First, the nature of the proceedings. It is true that the proceedings involve serious allegations against, amongst others, the third and fourth defendants which will have serious consequences for them if sustained ...
>
> ...
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> 83. Fourth, I must record *the negative consequences arising from an adjournment at such a late stage. These are obvious and very serious. They include, but are not limited to, the inconvenience to the witnesses who have been warned, wasted court time and resources and costs thrown away which may ultimately be irrecoverable.*
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> 84. Fifth, there is the wider public interest in the present litigation being concluded in a timely manner, in particular given the time that has elapsed so far since the proceedings were commenced. (emphasis added)

Applying The Principles Of Law To The Current Application

[22] To the mind of this court, there are two interrelated issues that stands out for this court's consideration when applying the relevant principles of law. Firstly, the medical evidence produced by the plaintiff and secondly, the inability of counsel to obtain instructions from the plaintiff.

The Medical Evidence

[23] Unless it was shown that the medical evidence was not genuine, more often than not, an adjournment application would be granted.

[24] In *Dick v. Piller* (*supra*) it was held that if an important witness is prevented by illness from attending the court for an adjourned hearing, and if the court is satisfied of the medical fact and that the evidence is relevant and may be important, it is the duty of the court to give an adjournment.

[25] However, a factor that must be considered by the court is whether injustice which cannot be compensated by costs would occasion if an adjournment is granted. This effectively means that the court will look beyond the medical evidence produced. (See *The Financial Conduct Authority (A Company Limited by Guarantee) v. Avacade Limited {in liquidation) (trading as Avacade Investment Options), Alexandra Associates (U.K.) Limited (trading as Avacade Future Solutions), Craig Stanley Lummis, Lee Edward Lummis, Raymond George Fox*).

[26] Reverting back to the current case, the plaintiff's plight is not the only consideration. The question is whether, as valid as the plaintiff's plight may be, is there prejudice to the defendants that cannot be compensated by costs. If there is, an adjournment should not be granted.

[27] Delay is an integral consideration when assessing prejudice. This court is guided by the Federal Court decision in *Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101 at 103; [1981] 2 MLJ 150 at 151, a case concerning want of prosecution, where the guidance given are as follows:

> We would specifically refer to the propositions enunciated by Salmon LJ, in *Allen* [1968] 2 QB 229 (at page 268), 245, 268 to *the effect inter alia in relation to the inordinate delay being inexcusable that as a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable, and again with regard to the question of serious prejudice to defendants by the delay, that this may be prejudice at the trial of the issue between themselves and the plaintiff or between each other or between themselves and third parties, and that as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.* The decision of the English Court of Appeal in *Biss v. Lambeth Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1 WLR 382, 389 (distinguishing Birkett [1978] AC 297, 317, 326 on a point under the English Limitation Acts, 1939 to 1975 not material for the purposes of the present appeal) is to the effect that in determining whether the delay after the writ had been issued is substantial, *the court has to consider whether the delay has prejudiced both a fair trial and the defendants, and in considering the prejudice to the defendants, the delay after the issue of the writ has to be considered against the delay before issue, and whether such delay has substantially prejudiced the defendants.* We would draw particular attention to the judgment of Lord Denning MR, stating (at page 389) that *prejudice to a defendant by a plaintiff's delay is not limited to the death or disappearance of witnesses or their fading memories or in the loss or destruction of records since there is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.* (emphasis added)

[28] In *R v. Kingston Upon Thames Justices Ex p. Martin* [1994] Imm AR 172 at 178, the English High Court, in considering an application for adjournment held in a manner highly instructive and applicable to the present application:

> *Whether or not an adjournment should be granted in any particular case,* more particularly whether or not fairness so clearly demands an adjournment that a refusal will found a successful judicial review application, *must inevitably depend on a variety of considerations.* These are likely to include: the importance of the proceedings and their likely adverse consequences to the party seeking the adjournment; the risk of his being prejudiced in the conduct of the proceedings if the application is refused; *the risk of prejudice or other disadvantage to the other party if the adjournment is granted; the convenience of the court and interests of justice generally in the efficient dispatch of court business;*

the desirability of not delaying future litigants by adjourning early and thus leaving the court empty; and the extent to which the applicant himself has been responsible for creating the difficulty which is said to require the adjournment in the first place; the extent to which, in short, he has brought the problem upon himself.
(emphasis added)

[29] Thus, it behoves this court to assess the injustice if any, that may arise if the said adjournment is granted. In this respect, it is an assessment of the defendants' grounds for objecting the adjournment.

[30] In a nutshell, the defendants' objections are purely made on the grounds that the adjournment directly prejudices them as it will affect their ability to present their best available defence to answer the plaintiff's case. This was because the suit relates to matters which occurred 40 to 50 years ago. The alleged material events which form the basis of the suit arose in the 1970s and the key allegations all concern this time period.

[31] This court is persuaded by the submissions of the defendants that they will suffer prejudice for the following reasons:

(i) Defendants' potential witnesses have already passed away or cannot be located.

Many of the key witnesses to material disputed facts have passed away. The late Tan Sri Lim Goh Tong is a key witness. The plaintiff makes allegations against him including that he agreed, in 1978, for the Genting shares (subject matter of the suit) to be held on her behalf. The late Tan Sri would have been able to respond to his daughter's allegations. Certain staff of the first defendant, Kien Huat Realty Sdn Bhd who prepared documents including accounting records (the authenticity of which are being challenged) have also passed away or can no longer be located.

(ii) Complete documents and information are no longer available.

The case was filed in the year 2016, more than 40 years after the material events alleged. Key documents of the first defendant and of third parties, which would fill in missing pieces and easily answer allegations of the plaintiff, are no longer available. Bank records, records from lawyers and documents from third parties cannot be obtained or are incomplete since there is no requirement or need to keep them for beyond six to seven years. Correspondence, memos, notes and internal documents of the first defendant have generally been discarded over a period of time in the normal course of business.

(iii) Issues being raised by plaintiff were never raised before.

The plaintiff has bided her time and filed the present suit, giving no indication before 2016 that she was the owner of the Genting shares for the preceding 40 years. As a result, the defendants did not have the

A opportunity to retain its contemporaneous records and documents from the 1970s, or take pro-active steps to establish the first defendant's ownership of the Genting shares at a time when witnesses and documents were readily available.

B **[32]** This court is guided by the case of *Vasudevan* (*supra*) where the Federal Court at p. 107 observed as follows, before proceeding to dismiss the action for want of prosecution:

> *Turning now to the question of the delay giving rise to a substantial risk that a fair trial would not be possible or is such as is likely to cause or to have caused serious prejudice to the respondents:* Both respondents claim that in the circumstances
C there is such a substantial risk and serious prejudice to them and we repeat that the prejudice is not only as between themselves and the appellant but also between each other or between themselves and third parties, and we have referred to the pleadings in this respect. The further and better particulars in respect of paragraphs 1 to 4 of the statement of claim furnished to the 1st respondent all relate to events in 1964
D pertaining to the oral agreement allegedly entered into, consents and the nomination of a nominee and refer to persons named and present some 17 years ago. *There is no certainty whether these persons referred to are still alive and if they are how sound their recollection of the events would be. On these counts both respondents would certainly be seriously prejudiced and as we have indicated*
E *the 2nd respondent against whom the substantive relief is now being sought is also equally affected by any serious prejudice to the 1st respondent. The 2nd respondent also avers that documentary evidence and accounts would not be kept for more than 6 years and further that as a housing developer it has not been able because of this action to develop the land which it had purchased solely for that purpose. We accordingly find there are substantial grounds for holding that the respondents have*
F *established the matter of a substantial risk of a fair trial not being possible after this long lapse of time and of serious prejudice as a result of the inordinate and inexcusable delay on the part of the appellant.* (emphasis added)

[33] In the case of *Senai Penting Properties Sdn Bhd v. Tri-Master Industries Sdn Bhd & Anor* [2006] 7 CLJ 135, the High Court found that the plaintiff's
G failure to set down an action for trial over a period of five years was a delay causing prejudice to the defendants. The nature of the prejudice was that the action concerned would largely depend on oral testimony and the delay of five years meant that most of the facts of the matter would no longer be in first defendant's key witnesses' memory and that other witnesses of the first
H defendant had moved and there would be difficulty in locating them.

[34] It is the view of this court that the timeframes in issue in the current case (*ie*, events and documents from more than 40 years ago) are far more significant than the circumstances accepted as causing serious prejudice in the case of *Vasudevan* and in the case of *Senai Penting Properties*.

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[35] This court also accepts the submission that there is no guarantee that each of the defendants' witnesses will be able to be present and give evidence on the trial dates fixed, or any adjourned trial dates as they are elderly. This because the youngest witness is 68 while the oldest is 75 and their health condition and longevity are uncertain. Issues such as the quality of evidence is also a relevant consideration.

[36] The evidence of the defendants' witnesses also ties into the authenticity and admissibility of key documents which are disputed by the plaintiff. If these witnesses are not present to give evidence, then the defendants may also have difficulty or may not be able to admit these documents.

[37] Therefore, the numerous grounds to support prejudice raised by the defendants clearly have been made out by the defendants. The sum total of the grounds raised clearly results in an injustice which cannot be compensated by costs to the defendants if an adjournment is granted indefinitely.

[38] It is obvious to this court that matters beyond medical evidence must be considered in exercising this court's discretion. The proceedings involve serious allegations against the defendants which will have serious consequences for them if sustained.

[39] It is the view of this court that the criteria set in *Dick v. Piller* have been met. In short, the injustice to the defendants outweighs the medical evidence given by the plaintiff.

[40] Notwithstanding the above being sufficient to dismiss the application, for completeness, it is necessary to examine the second reason put forward by the plaintiff in seeking for the adjournment.

The Inability To Obtain Instructions

[41] The second issue for this court to consider is the inability to proceed with trial because counsel could not obtain instructions from the plaintiff.

[42] It is not the first time that plaintiff's counsel found difficulties in obtaining instructions from her. In September 2020, counsel for the plaintiff sought for an adjournment due to the plaintiff having to undergo a major orthodontic surgery. Pictures of the plaintiff's gums were shared to demonstrate the extent of the surgery so that the trial could be adjourned. The court vacated seven days as a result of the said surgery.

[43] In early 2020, before Covid-19 was declared as a pandemic and a lock down was implemented, counsel informed that they could not obtain instructions from the plaintiff due to her being unwell as a result of a trip to China/Hong Kong. It was conveyed to this court that due to the rising Covid-19 cases, she being a high risk individual (due to her age) did not want

to be exposed to anyone. As such, counsel could not meet up with the plaintiff to obtain the necessary instructions. The court vacated four days of fixed trial dates on this ground.

[44] The inability for counsel to seek instructions is therefore not something new. To the mind of this court, it goes back to the seriousness of the plaintiff in wanting to prosecute her case. If the plaintiff saw it fit to file her suit in 2016, she must be prepared to instruct counsel long before the early January 2022 dates. The plaintiff must shoulder the responsibility to ensure that proper and timely instructions are given to her counsel to prepare for trial.

[45] Counsel for the plaintiff argued that it was wrong to downplay the plaintiff's life-threatening medical condition and for the defendants to equate the orthodontic procedure to cancer. With the greatest of respect, it is not a discussion of which condition is more serious than the other. Both medical conditions have been used to seek adjournments. As stated previously, the plight of the plaintiff cannot be the sole consideration for this court when there is prejudice that cannot be compensated by costs.

[46] Therefore, the reason that counsel could not obtain instructions from the plaintiff no longer prompts a question as to why instructions could not be obtained as it is a stale excuse. This court rejects the application made on this ground.

Discontinuance Application Filed By The Plaintiff (Encl. 132)

[47] The trial could have gone on much earlier. However, in September 2020, the plaintiff filed a discontinuance application *vide* encl. 132. The background to the said application can be traced to the following events:

(i) at a case management on 3 September 2020, the plaintiff sought an adjournment of trial dates fixed in September 2020, citing an orthodontic condition and need to obtain treatment. The adjournment of trial dates fixed for September was allowed on that basis;

(ii) on 18 September 2020, the court fixed further trial dates from 17 November 2020 to 20 November 2020 and 14 December 2020 to 16 December 2020;

(iii) at a case management on 30 September 2020, the plaintiff's counsel informed the court that the plaintiff wanted to mediate the matter and if that was not possible, she would seek to withdraw the matter with liberty to file afresh;

(iv) by encl. 132 filed on 9 October 2020, the plaintiff sought to discontinue the suit with liberty to file afresh on the basis she would not be able/ prepared to proceed with the November and 2020 trial dates. She cited a problem with her gums and teeth and stated that she has been advised

to "undergo substantial orthodontic surgery" which is "expected to be scheduled in November and December 2020". This was, in effect, the same basis for the adjournment sought in September 2020;

(v) from the affidavit filed in the plaintiff's supplemental affidavit in support, the surgery was not an emergency or urgent surgery. The plaintiff's periodontist recommended that there be no "further procrastination" meaning that the plaintiff has already chosen to delay surgery for some time. In fact, the plaintiff stated that she was advised to undergo surgery in August 2020;

(vi) the court vacated the November 2020 and December 2020 hearing dates to enable encl. 132 to be heard; and

(vii) on 17 December 2020, just one day after 16 December 2020, the last trial date vacated, the plaintiff's solicitors wrote to the court to then state that the plaintiff wished to withdraw encl. 132.

[48] The withdrawal of encl. 132 was very much a disappointing turn of events. The court was led to believe that there was a genuine attempt by the plaintiff to take stock of matters in the circumstances that she was in. It was not wrong for this court to believe that all that was left to be determined once encl. 132 was disposed is whether the plaintiff ought to be allowed to re-file her claim. Along the way, valuable trial dates were vacated in anticipation of the discontinuance application.

The Plaintiff's Track Record

[49] The track record of the plaintiff paints a picture of her being of a reluctant and hesitant litigant. This court granted numerous adjournments due to the medical evidence produced. This was primarily due to humanitarian considerations. The plaintiff was after all an elderly litigant who might be expected to be susceptible health issues. However, the generosity of this court has its limits.

[50] The latest application has taken the request to a different level. It has resulted in the need for this court to look not just at the plight of the plaintiff but also those embroiled in the suit. This is where this court is guided by the principles of *Lee Ah Tee* and *Dick v. Piller*. The prejudice to the defendants must be considered beyond the medical evidence of the plaintiff.

Other Reasons Offered

[51] Apart from the medical evidence of the surgery shown to the court in the morning of 10 January 2022, two weeks later, counsel for the plaintiff informed that the plaintiff's "capacity to participate in and conduct proceedings" and "capacity to instruct" solicitors are impaired. The plaintiff will also "lack the mental capacity to litigate". The sudden and new medical condition was indeed a surprising revelation.

[52] However, there was nothing that was produced by the plaintiff to support her condition but for the submissions made by her counsel.

[53] Without any medical evidence or expert view on the alleged mental condition, the plaintiff is expecting the court to anticipate an adverse effect on the plaintiff's "mental capacity" which, it is said, would impair her capacity to, among other things, (i) fully understand the progress of the trial, (ii) give evidence, respond to the questioning of the subpoenaed witnesses (*ie*, the formal witnesses) and be cross-examined, and (iii) fully understand advice rendered and to weigh the advice.

[54] The additional medical reasons given to the court was simply to drive home the point that the plaintiff is incapable of proceeding with the trial both physically and due to her mental incapacity. Consequently, the plaintiff asserts that no trial dates should be fixed until August 2022. Even then, no guarantee that the plaintiff will be fit to proceed with the trial in August 2022.

[55] This court is not at all persuaded by the argument put up by counsel for the plaintiff. It is purely a submission from the bar without anything more.

[56] The new medical condition made in the further submissions in claiming to be mentally incapable did not assist her case as it is an attempt to amplify her grounds for an adjournment which in reality was unsupported by any evidence or valid reasons.

[57] Labouring under mental incapacity cannot be lightly taken. It is a serious condition. It is entirely inappropriate for any submissions on this to be made on behalf of the plaintiff without appropriate foundation, particularly as it falls within the purview of a medical expert. The plaintiff's solicitors are not qualified to regard the plaintiff as a patient under the Mental Health Act 2001 or to assert any similar condition. There is absolutely no evidence of the plaintiff's mental disability or lack of mental capacity, whether current or prospective, before the court. There is no mention of any cognitive impairment in the plaintiff's doctor's letter dated 28 December 2021.

[58] This court is not convinced by the mental incapacity ground simply because such claim was not substantiated in any manner. It cannot assist the plaintiff for an indefinite adjournment.

The Options

[59] Parties were directed by this court to submit on the options this court has in determining the next steps going forward. The plaintiff suggested the following options:

Option 1: The Defendants Opening Their Case (Through Expert Or Other Witnesses)

[60] The plaintiff proposes that the defendants proceed first with the examination of the defendants' expert witness, Lee Gek Kwee. The plaintiff also proposes as another option that the defendants' factual witnesses give evidence after the plaintiff's formal witness, but before the plaintiff herself.

[61] To the mind of this court, in each scenario, the plaintiff is requiring the defendants to open their case and present their defence before the plaintiff has even mounted a case to answer. The plaintiff herself has represented that she has only one material witness of fact – herself. She has not given evidence and therefore no material facts are before the court.

[62] It is obvious that the defendants are entitled to hear the case against them and to test, by cross-examination, the evidence of the plaintiff and her witnesses. It is trite that the defendants are not required to produce a single witness until the plaintiff has shown her hand. The defendants are required to meet the plaintiff's case and not otherwise.

[63] Once the plaintiff closes her case, the defendants are entitled to consider, based on the evidence as it stands, whether they wish to take the position that there is no case to answer *ie*, either that (i) accepting the plaintiff's evidence at face value, the plaintiff had not made out a case in law or (ii) the evidence produced by the plaintiff is unsatisfactory or unreliable for the court to hold that the burden on the plaintiff had been discharged; *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369; [2008] 3 MLJ 81 at 94. The plaintiff's proposed options, where the defendants proceed first, shuts that door and deprives the defendants of that right. The plaintiff meanwhile gets to test the evidence of those she has sued, effectively reversing the practical burden of proof.

[64] The default position is a plaintiff must open her case (see O. 35 r. 4(2) of the Rules of Court 2012). An exception is provided under O. 35 r. 4(6) which is where "the burden of proof of all the issues lies with the defendant". This is not a case falling within the exception. The burden of proof lies with the plaintiff.

Option II: Trial Proceeding With The Plaintiff's Factual Witnesses

[65] The plaintiff also suggests as an option that it may be possible for the plaintiff to proceed with her four formal witnesses first, but only if certain conditions as set by the plaintiff are satisfied. The conditions being:

(i) the examination of these witnesses to be conducted on a scheduled basis to take into account the plaintiff's treatment schedule;

(ii) time ought to be given to the plaintiff's solicitors to brief, consult and seek instructions from the plaintiff after each of the witnesses is cross-examined, and a proper report and recording of the proceedings ought to be properly drawn up before such consultation;

(iii) the plaintiff must not be in the midst of getting her treatment in the hospital or recovering from the immediate treatment when such consultation takes place;

(iv) trial will thereafter resume with re-examination of the respective witnesses after the plaintiff's solicitors have been able to brief, consult, and seek instructions from the plaintiff; and

(v) the plaintiff will then take the witness stand only after July 2022, upon the completion of her chemotherapy.

[66] The strict conditions imposed by the plaintiff realistically mean that the dates for trial would be at large. The progress of the trial would depend not just on the plaintiff's treatment schedule but also her recovery following treatment and time taken for plaintiff's lawyers to consult with her. The court cannot be expected to fix tentative dates and be dictated by the plaintiff's availability. The diary of the court cannot be subjected to the plaintiff's convenience as it would mean this court needs to treat this case as an exceptional and extraordinary case.

Option III: Section 73A Of The Evidence Act 1950

[67] The plaintiff suggests that the defendants' witnesses affirm affidavits under s. 73A of the Evidence Act 1950. This suggestion is ostensibly made to counter the defendants' submission that any further delay in proceeding with the trial may jeopardise the defendants' case as older witnesses may have live to testify in the future. This effectively means that the plaintiff's solicitors are dictating how the defendants should conduct their case with all the attendant disadvantages to their case. Section 73A(3) of the Evidence Act 1950 reads:

> 73A. Admissibility of documentary evidence in civil cases, *etc.*
>
> (1) ...
>
> (2) ...
>
> (3) Nothing in this section shall render admissible as evidence **any statement made by a person interested** at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish. (emphasis added)

[68] Section 73A(3) of the Evidence Act 1950 clearly states that any statement made by interested witnesses in the proceedings involving a dispute of any fact is inadmissible. This court fully appreciates the objection raised by the defendants as it renders virtually all statements by the defendants' witnesses potentially inadmissible as it is open to the plaintiff to argue that the defendants' witnesses have an interest in the outcome of the suit and are not independent.

[69] It is trite that the defendants are entitled to call the best available evidence to support the defendants' case. The option suggested by the plaintiff deprives the defendants the right to present their best evidence.

The Options Not Viable

[70] If this court were to accept any one of the options suggested, the progress of this case will in essentially be in the hands of the plaintiff which is contrary to the new case management regime, where the court and the court alone is in the driver's seat. This is consonant with the guidance given in the Federal Court decision of *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1; [2016] 1 MLJ 301.

[71] Although the above guidance was given to send a message that case managements must be effectively carried out to avoid last minute applications for amendments, it nevertheless would apply in the current scenario where this court is considering the next steps going forward.

[72] It is the view of this court that the options given by the plaintiff will prejudice the defendants as they were purely one sided. Further, the options would entail the court to embark on an unconventional method of trial. This court does not find the options given by the plaintiff to be viable. Accordingly, they are rejected.

The Consequential Order

[73] To date, the case of the plaintiff remains unproven. The plaintiff has not given evidence. She is the only material witness of fact in her case. The other witnesses are her expert witness and formal witnesses. While the plaintiff has opened her case by producing a single witness, this is not a witness of fact. It is an expert witness opining on a signature. The plaintiff has not put in any material evidence of fact before the court for consideration.

[74] In *Anne Lim Keng See v. Malayan Banking Bhd* [2009] 10 CLJ 34 at p. 40; [2009] 9 MLJ 502 at p. 508, the High Court after considering the circumstances, did not allow an adjournment of the suit. The court thereafter proceeded to dismiss the case. Harminder Singh JC (now FCJ) held as follows:

> [19] In the present case, the plaintiff was the only witness and was absent, the court was entitled to order a dismissal of the action as the case for the plaintiff remained unproven ...
>
> [20] This demonstrates the importance of ensuring the presence of the parties and their witnesses when the action is called on for hearing or trial. If the parties do not attend and do not ensure that their witnesses are present, they do so at their own peril.

[75] In the case of *Tee Ha Leong v. Tetuan Low & Lim & Anor* [2005] 2 CLJ 78; [2005] 4 MLJ 426, the plaintiff sought an adjournment of the trial but this was rejected by the High Court. James Foong J thereafter ordered the plaintiff's counsel to present his case. Since the plaintiff was the only witness, the plaintiff's case was dismissed with cost.

[76] In the Federal Court case of *Toh Hock Thye & Ors v. Toh Chwee Biow* [1981] 1 LNS 143; [1982] 1 MLJ 165, the court upheld the dismissal of an action for want of prosecution by reason that the plaintiff was guilty of inordinate and inexcusable delay that prejudiced the defendant. Similarly in the case of *Vasudevan* (*supra*) the Federal Court, also upheld the dismissal of a claim for want of prosecution as there was a substantial risk of a fair trial not being possible after a long lapse of time and serious prejudice as a result of the inordinate and inexcusable delay.

[77] This court is persuaded by the observation of counsel for the defendants that the common denominator in these cases is simply that where the circumstances are such that some form of delay is contemplated by reason of a plaintiff's actions (whether by reason of a request for adjournment or want of prosecution) which results in prejudice to the defendants that cannot be compensated by costs, the court is entitled to dismiss the case.

Conclusion

[78] This court finds the appropriate order is to refuse the application. The prejudice to the defendants cannot be compensated by costs.

[79] Based on the authorities mentioned above and exercising this court's inherent powers, the case of the plaintiff is hereby dismissed with costs.